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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ELITE LOGISTICS CORPORATION	)	Case No. CV 11-02952 DDP (PLAx)
and on behalf of all others	)	
similarly situated,	)	
	)	
Plaintiff,	)	<b>ORDER DENYING PLAINTIFFS' MOTION</b>
	)	<b>FOR CLASS CERTIFICATION</b>
v.	)	
	)	
MOL AMERICA, INC.,	)	[Dkt. No. 119]
	)	
Defendants.	)	
_____	)	

Presently before the court is Plaintiffs' Motion for Class Certification. Having considered the submissions of the parties and heard oral argument, the court denies the motion and adopts the following order.

**I. Background**

As described in this court's earlier orders, Defendant MOL (America) Inc. ("MOL") is an international ocean carrier, and transports cargo in shipping containers MOL owns. Independent motor carriers, or truckers, such as Plaintiffs, transport MOL's cargo containers from ports to inland distribution centers, then return the empty containers to MOL at the port. MOL contracts with

1 the cargo owners, not with the truckers, for the overland  
2 transport. The cargo owners, in turn, hire and pay the truckers.

3 MOL's contracts with cargo owners provide for some period of  
4 "free time," during which MOL does not charge customers for the use  
5 of its shipping containers. When containers are returned after the  
6 expiration of the "free time" period, MOL assesses a "detention  
7 charge." In other words, MOL allows its cargo customers to check  
8 out, or borrow, the shipping containers containing the cargo  
9 owners' property at no charge for a certain time period. Ideally,  
10 the container can be delivered to the cargo owner, unloaded, and  
11 then returned to MOL within the "free time" period. If the  
12 container is returned late, however, MOL charges a late return  
13 fee.<sup>1</sup>

14 Although cargo owners contract with MOL to transport  
15 containers to the inland container yard, the independent truckers  
16 actually pick up, transport, and return MOL's containers. The  
17 truckers are not, however, parties to the transportation service  
18 contract between MOL and the cargo owners. Nevertheless, when  
19 truckers are late returning MOL's containers, MOL charges late fees  
20 to the truckers, not to the contracting cargo owners.  
21 The truckers pay the late fees, then in turn bill cargo owners for  
22 those fees. If a trucker refuses to pay late fees to MOL, the  
23 trucker may be denied access to shipping containers, essentially  
24 foreclosing the trucker from doing business.

25 In 2005, California enacted Business and Professions Code §  
26 2298, which states:

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27  
28 <sup>1</sup> The parties refer to this late fee either as a "detention  
charge" or "per diem."

1 (b) An intermodal marine equipment provider or  
2 intermodal marine terminal operator shall not impose per  
3 diem, detention, or demurrage charges on an intermodal  
4 motor carrier relative to transactions involving cargo  
5 shipped by intermodal transport under any of the following  
6 circumstances:

7 (1) When the intermodal marine or terminal truck  
8 gate is closed during posted normal working hours. No per  
9 diem, detention, or demurrage charges shall be imposed on  
10 a weekend or holiday, or during a labor disruption period,  
11 or during any other period involving an act of God or any  
12 other planned or unplanned action that closes the truck  
13 gate.

14 Cal. Bus. & Profs. Code § 2298.

15 Plaintiffs allege, on behalf of a putative class, that MOL  
16 violated California Business and Professions Code § 2298 and  
17 breached a contract by charging late fees on weekends and holidays.  
18 Plaintiffs now move to certify a Rule 23(b)(3) damages class  
19 comprised of all intermodal motor carriers who were charged and  
20 paid per diem and demurrage detention charges in California for  
21 weekend days and holidays when the ports were closed from April 7,  
22 2007 to the present.

## 23 **II. Legal Standard**

24 The party seeking class certification bears the burden of  
25 showing that each of the four requirements of Rule 23(a) and at  
26 least one of the requirements of Rule 23(b) are met. See Hanon v.  
27 Dataprods. Corp., 976 F.2d 497, 508-09 (9th Cir. 1992). Rule 23(b)  
28 defines different types of classes. Leyva v. Medline Indus. Inc.,  
716 F.3d 510, 512 (9th Cir. 2012). Rule 23(b)(3) requires that  
"questions of law or fact common to class members predominate over  
individual questions . . . , and that a class action is superior to  
other available methods for fairly and efficiently adjudicating the  
controversy." Fed. R. Civ. P. 23(b). Rule 23(a) sets forth four  
prerequisites for class certification:

1 (1) the class is so numerous that joinder of all members  
2 is impracticable, (2) there are questions of law or fact  
3 common to the class, (3) the claims or defenses of the  
4 representative parties are typical of the claims or  
5 defenses of the class, and (4) the representative parties  
6 will fairly and adequately protect the interests of the  
7 class.

8 Fed. R. Civ. P. 23(a); see also Hanon, 976 F.2d at 508.

9 These four requirements are often referred to as numerosity,  
10 commonality, typicality, and adequacy. See Gen. Tel. Co. v.  
11 Falcon, 457 U.S. 147, 156 (1982).

12 In determining the propriety of a class action, the  
13 question is not whether the plaintiff has stated a cause of  
14 action or will prevail on the merits, but rather whether the  
15 requirements of Rule 23 are met. Eisen v. Carlisle &  
16 Jacquelin, 417 U.S. 156, 178 (1974). This court, therefore,  
17 considers the merits of the underlying claim to the extent  
18 that the merits overlap with the Rule 23(a) requirements, but  
19 will not conduct a "mini-trial" or determine at this stage  
20 whether Plaintiffs could actually prevail. Ellis v. Costco  
21 Wholesale Corp., 657 F.3d 970, 981, 983 n.8 (9th Cir. 2011).  
22 Nevertheless, the court must conduct a "rigorous analysis" of  
23 the Rule 23 factors. Id. at 980. Because the merits of the  
24 claims are "intimately involved" with many class  
25 certification questions, the court's rigorous Rule 23  
26 analysis must overlap with merits issues to some extent.  
27 Id., citing Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541,  
28 2551 (2011).

### 29 **III. Discussion**

30 The central issue presented by MOL's Opposition is the  
31 applicability of a "pass-on" defense to Plaintiffs', and in

1 particular, Elite's, claims. A pass-on defense seeks to  
2 eliminate liability by proving that a plaintiff has passed on  
3 an overcharge to a subsequent purchaser, and therefore  
4 suffered no injury. See Clayworth v. Pfizer, Inc., 49 Cal.  
5 4th 758, 766 (2010). Such a defense, if viable, would  
6 present serious typicality, adequacy, and predominance  
7 problems, and preclude certification of the proposed damages  
8 class under Rule 23(b)(3).

9 As explained above, MOL enters into service contracts  
10 with cargo owners, but charges late fees to independent  
11 truckers, such as Elite. Elite must pay those fees at pain  
12 of being barred from MOL's marine terminal and shut out of  
13 the intermodal transportation market. However, Elite can,  
14 and apparently does, seek and obtain payment from cargo  
15 owners for the late fees assessed by MOL.

16 As pertinent here, in late 2007, Elite's president and  
17 owner, Moon Chul Kang, contested the amount of late fees MOL  
18 charged Elite for a shipment to LG Electronics, and sought a  
19 discount.<sup>2</sup> MOL acceded to the request and accepted Elite's  
20 payment of 60% of the assessed late fees. Elite, however,  
21 then invoiced and received from LG approximately 170% of the  
22 amount Elite paid to MOL. Thus, although Elite did pay late  
23 fees to MOL, including some improperly assessed late fees,  
24 Elite was not only reimbursed for those expenses, but  
25 ultimately appears to have profited from the exchange.

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28 <sup>2</sup> Elite's representations regarding the reasons for the  
discount form the basis of MOL's Counterclaim.

1 MOL contends that, because Elite obtained a windfall  
2 from the LG late fee transactions, Elite cannot show that it  
3 suffered any damages. Elite, for its part, argues that the  
4 amount of money it received from LG is irrelevant because the  
5 "pass-on defense is unavailable for determining standing or  
6 damages." (Opp. at 14.)

7 As this court has previously noted, the California  
8 Supreme Court has limited the use of a pass-on defense as a  
9 barrier to standing in suits under state antitrust law.  
10 Clayworth, 49 Cal. 4th at 789 ("That a party may ultimately  
11 be unable to prove a right to damages . . . does not  
12 demonstrate that it lacks standing to argue for its  
13 entitlement to them. . . . [M]itigation, while it might  
14 diminish a party's recovery, does not diminish the party's  
15 interest in proving it is entitled to recovery."). The  
16 California Supreme Court extended that principle to a  
17 consumer suit under California's Unfair Competition Law in  
18 Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 334 (2011).

19 Elite, citing Clayworth and Kwikset, asserts that the  
20 pass-on defense "is not viable as a matter of law" with  
21 respect to either standing or damages. (Opp. at 14.)  
22 Neither case, however, stands for such a broad proposition.  
23 As an initial matter, neither case addressed class  
24 certification issues, and both limited discussion of the  
25 pass-on defense to questions of standing. Further, this  
26 court is not persuaded by Elite's suggestion that the Kwikset  
27 court imposed a general bar on pass-on defenses, or even a  
28 bar in all UCL cases. Rather, the court disapproved of the

1 defense in the context of a consumer claim for false  
2 advertising. In Kwikset, a consumer brought suit challenging  
3 the veracity of a lockmaker's claim that its products were  
4 made in the United States. Kwikset, 51 Cal. 4th at 316. In  
5 that context, the pass-on defense was premised on the fact  
6 that the locks, regardless of their actual country of origin,  
7 were functional and could be re-sold. Id. at 333-336. The  
8 Kwikset court rejected that reasoning, however, because it  
9 ignored consumers' material valuation of intangibles, such as  
10 American manufacture, and the resulting economic harm  
11 resulting from purchases based on misrepresentations,  
12 including transactional costs associated with resale. Id. at  
13 329, 333-334.

14 The court is not persuaded, however, that the Kwikset  
15 court's logic is applicable here, outside the consumer arena,  
16 in a case involving a clear-cut statutory violation, and in  
17 the context of class certification to a question of damages  
18 rather than standing. Granted, Elite suffered harm when it  
19 was charged illegal late fees. Its argument for a pass-on  
20 defense bar is premised on the difficulty of apportioning  
21 ostensibly resultant damages, such as "the negative  
22 competitive effects of charging greater amounts to its  
23 customers." But that policy argument is vitiated by the fact  
24 that Elite charged "greater amounts" to its customers not  
25 merely because Elite itself incurred greater costs, but  
26 because Elite wanted to profit by playing LG off against MOL.  
27 Insofar as advancement of the UCL's goals underpins  
28 proscriptions of the pass-on defense, application of such a

1 bar under the circumstances here might do more harm than  
2 good. Nor is the court persuaded by Elite's contention that,  
3 because cargo owners are not charged late fees and therefore  
4 do not have standing, no party can possibly recover for  
5 illegally charged late fees absent imposition of the bar.  
6 Only those parties who were made whole, or who, like Elite,  
7 actually profited from the imposition of fees, will face such  
8 an obstacle.

9 In any event, regardless of the general availability of  
10 pass-on defenses, the above discussion makes clear that the  
11 particularities of Elite's interactions with MOL and with  
12 cargo customers render Elite's claims, and the defenses to  
13 them, atypical of those of the class. Class certification  
14 should not be granted if there is a danger that defenses  
15 unique to the putative class representative will become a  
16 focus of the litigation. Hanon, 976 F.3d at 508. Here, at  
17 the very least, questions regarding Elite's unclean hands  
18 would prove a distraction. Accordingly, Elite has failed to  
19 satisfy the requirements of Rule 23.

20 **IV. CONCLUSION**

21 For the reasons stated above, Plaintiff's Motion for  
22 Class Certification is DENIED.

23  
24 IT IS SO ORDERED.

25  
26 Dated: February 2, 2016



27 DEAN D. PREGERSON  
28 United States District Judge